A **FOLIN & BROTHERS SDN BHD (IN LIQUIDATION) & ORS**

v.

FOLIN FOOD PROCESSING SDN BHD & ORS (NO 2)

B HIGH COURT MALAYA, KUALA LUMPUR
ANANTHAM KASINATHER J
[SUIT NO: D22-NCC-674-2009]
21 JANUARY 2011

C ***COMPANY LAW:*** *Shares - Valuation - Oppression-on-minority petition filed by shareholders - Consent order between liquidators and defendant shareholders of company - Valuer appointed to determine fair price of shares for sale to defendants - Whether valuation binding on all parties to consent order - Whether manifest error or negligence in valuation*

D The third defendant and the second and third plaintiffs ('the liquidators') in the original action were directors of Folin Food Processing Sdn Bhd ('Folin Food'). As directors, the liquidators represented the interests of the majority shareholder in Folin Food. A dispute over the management of Folin Food arose. The third, fourth and fifth defendants in the E original action, who were shareholders in the company, launched a s. 181 petition under the Companies Act 1965, alleging oppression as minority shareholders, and cited the liquidators and the company as respondents. By a consent order the parties reached a settlement and the petition was withdrawn. Pursuant to the consent order, Ernst & Young ('EY') were F appointed to value the shares of Folin Food within 90 days. Upon a fair price for the shares being ascertained, a sale and purchase agreement was to be executed within 30 days for sale of the shares to the said defendants.

The liquidators represented to EY that the third defendant was in charge G of the day to day management of Folin Food. Accordingly, EY's representative, DW2, dealt with the third defendant. Upon the latter's nomination, DW2 appointed First Pacific Valuers Property Consultants Sdn Bhd ('First Pacific') to value Folin Food's shares. The shares were valued at RM2.9m. The liquidators challenged the valuation and told EY H that Folin Food's Board of Directors had never authorised them to deal with the third defendant. They also challenged the accuracy of the audited accounts of the company and suggested EY re-value the shares. The liquidators refused to execute the sale and purchase agreement for the sale of the shares to the third, fourth and fifth defendants at the I price valued by EY. The liquidators filed the instant claim for a declaration that the valuation of the company's shares at RM2.9m was not a fair price and an injunction to prevent the sale of the shares to

the parties concerned. They also alleged negligence on EY's part in the preparation of the valuation and sought damages against them. The third, fourth and fifth defendants filed a counterclaim seeking specific performance of the consent order for the sale of the shares to them.

Held (dismissing the plaintiff's claim; allowing the defendants' counterclaim):

(1) DW2 did not depart from the terms of the consent order by acting on the instructions of the third defendant. There was no manifest error on his part. DW2 was justified in dealing with the third defendant to the exclusion of the liquidators because he was a director of Folin Food and it was PW1, on behalf of the liquidators, who had required DW2 to deal with the third defendant. (paras 15 & 18)

(2) The allegation that DW2 erroneously relied on the 2008 draft audited accounts without regard to disputed excluded items was without merit. Folin Food was a dormant company whose only income was from rental collection. For that reason, the accounts of the company were not material. The liquidators also did not regard the disputed excluded items to be material. (para 18)

(3) The third defendant was the director of Folin Food and entitled to nominate First Pacific in the absence of any suggestion of collusion between him and First Pacific. There was no manifest error in the appointment of First Pacific. (paras 19 & 20)

(4) Once it was acknowledged that the appointment of First Pacific was lawfully made under the terms of the consent order and as no allegation of fraud or collusion in its appointment was raised, the valuation of DW2 could not be challenged. (para 21)

Case(s) referred to:

Australia v. Wawbe Pty Ltd BC 9805379 ***(refd)***

Evergrate Construction Co Pte Ltd v. Presscrete Engineering Pte Ltd [2006] 1 SLR 634 ***(refd)***

Mead v. Watson as Liquidator for Hypec Electronics [2005] NCWCA 133 ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 CLJ 779 CA ***(refd)***

For the plaintiffs - Fiona Bodipalar (James Chow & Darren Lai with her); M/s Chow Kok Leong & Co

For the 2nd defendant - Sean Yeow (Joyce Lim with him); M/s Lee Hishamuddin Allen & Gledhill

For the 3rd, 4th & 5th defendants - Michael Chow (Derek Chong with him); M/s Michael Chow

Reported by Ashok Kumar

A

JUDGMENT

Anantham Kasinather J:

Background Facts

B **[1]** Folin Brothers Sdn Bhd ('Folin Brothers') is the registered proprietor of one million shares in Folin Food Processing Sdn Bhd ('Folin Food'). Dato' Khoo Peng Lai and Eng Pak Yam ('the Liquidators') hold two of these shares on trust for Folin Brothers whilst the 3rd, 4th and 5th defendants together with Wong Bung Sun and the C Estate of Wong Foo Ling, all hold one share each in Folin Food ('See Q & A 4 WSPW1). The registered proprietors of the shares of Folin Brothers, in turn, are the third, fourth and fifth defendants together with Wong Bung Sun and the Estate of Wong Foo Ling with the third, fourth and fifth defendants holding 25% each and the balance 25% jointly owned by Estate of Wong Foo Lim and his son Wong Bung Sun, an D undischarged bankrupt (See Q & A 1 of WSD DW3).

[2] The board of Folin Food is and was, at all material times, made up of three members, namely, the liquidators and third defendant in the original action. The liquidators being appointed directors of Folin Food E upon their acquiring one share each in Folin Food.

[3] A dispute arose between the three plaintiffs to the counter-claim, on the one hand, and the liquidators, on the other hand, as to the management of the affairs of Folin Food resulting in the three plaintiffs to the counter-claim launching a s. 181 petition alleging oppression as F minority shareholders of Folin Food. The respondents to the 181 petition were Folin Food and the liquidators. When the petition was awaiting disposal, the parties reached a settlement. The settlement was recorded by way of a consent order dated 4 June 2009 ('consent order') before the Honorable Justice Mary Lim. The consent order reads as G follows:

Petition No D4-26-74-2008

Consent Order

H Upon the application of Mr Wong Sin Fan@ Wong Kon Loong, Mr Wong Kee Sang and Mr Wong Kee Chong, the above named Petitioners and upon hearing the Petition dated 17 September 2008 and Affidavit Verifying Petition affirmed by Mr Wong Sing Fan@ Wong Kon Loong on 17 September 2008 and upon hearing Dato' Loh Siew Cheang (Mr Kelvin Seet Wan Nam and Mr Wong Mun How with him), Counsel for the Petitioners and Mr Benjamin Dawson (Mr I

James Chow Kok Leong with him), Counsel for the 2nd Respondent and Ms Sam Cheah Poh Hoon, Counsel for the 3rd Respondent. It is hereby ordered by consent that:

(1) Ernst & Yong to be appointed as expert to value the shares of the 1st Respondent with unfettered and unrestricted access to the books of the 1st Respondent which the exercise is to be completed within 90 days from 4th day of June 2009;

(2) Upon ascertainment of a fair price of the shares of the 1st Respondent, a sale and purchase agreement ('Sale and Purchase Agreement') is to be entered into between the relevant parties within 30 days;

(3) The Sale and Purchase Agreement to provide the 10% of the purchase price is to be paid upon signing and the balance is to be paid within 3 months with the right of extension of 30 days subject to interest payment at Maybank rate in respect of that extension;

(4) The petition be withdrawn with no order as to costs and with no liberty to file afresh;

(5) The Petitioners to withdraw the notice of appeal filed on 2nd June 2009 with no order as to costs.

[4] I pause to observe that the liquidators as the respondents in said petition were represented by solicitors and consented to the order of court of 4 June 2009 through their solicitors.

[5] According to Mr Vikneswaran a/l Manickavasagar ('DW2'), the partner in the 2nd defendant firm appointed to undertake the valuation of the shares of the 1st respondent, they had been approached by the solicitors for the petitioner and the 3rd defendant in this action to ascertain whether they were prepared to undertake this assignment even before the consent order (see Q & A 3 of WSDW2). Since the court order made no provision for their fees, the 2nd defendant prepared a proposal of their fees for the consideration of Folin Food, before agreeing to undertake the assignment. This proposal and the acceptance of Folin Food appear as exhs. 1 to 19 of bundle E. The letter from the 2nd defendant making known its terms of reference and appointment was addressed to Folin Food but to the attention of the 3rd defendant. The reason for this letter being directed to the attention of the 3rd defendant was the result of the representations of Eng Peak Yam ('PW1'), on behalf of the liquidators, when contacted by DW2 that the 3rd defendant was the person in charge of the day to day management of Folin Food. This representation also resulted in the 3rd defendant signing the 2nd defendant's letter of appointment (exh. 19 of E).

[6] At the outset of his appointment, DW2 was informed that Folin Food was a dormant company and its sole substantial asset, the property in Jalan 223, Petaling Jaya ('the property'). This is evident from the recitation of the background facts in exh. 4 of E. Since DW2 is not a registered valuer, he was obliged to appoint a property valuer before he could prepare the valuation of the shares of Folin Food (See Q & A 6 of WSDW2). To avoid any allegation of biasness, DW2 required the 3rd defendant to nominate a qualified property valuer to undertake this exercise. This requirement was already stipulated in the letter containing the 2nd defendant's terms of reference and appointment (exh. 4 of E). The valuer appointed by the 2nd defendant, pursuant to the nomination of the 3rd defendant, was First Pacific Valuers Property Consultants Sdn Bhd ('First Pacific'). The valuation itself was undertaken by En Mohd Sarip bin Mohd Salib ('DW1'), on behalf of First Pacific. The report of DW1 appears as exh. 20-76 of bundle E.

[7] DW2 valued the fair price of the shares of Folin Food at 2.9 Million, pursuant to the consent order (exh. 102-125 of bundle B). The valuation was based on the report of DW1 and the draft audited accounts of Folin food as at 31 December 2008 (See Q & A 11 of WSDW2). According to DW2, the reason why he valued the shares as at 31 December 2008 was because the latest audited accounts of Folin Food available at the time of valuation, was of that date. However, the valuation of the property was as at 30 July 2009 (See Q & A 16 of WSDW2). DW2 filed his valuation report dated 25 August 2009 with the High Court on 4 September 2009 and extended a copy of the report to the solicitors for the plaintiff. This prompted a reply from the plaintiff dated 8 September 2009 (exh. 163 of bundle B). The liquidators who had not communicated with DW2 throughout the 90 day period apart from requiring DW2 to communicate with the 3rd defendant now, for the first time, informed the 2nd defendant that the board of directors of Folin Food had never authorized him to deal with the 3rd defendant. In the same letter, they challenged the accuracy of the audited accounts and suggested that DW2 re-value the shares. For the purposes of the revaluation exercise, the Liquidators offered to furnish the minutes of the company's AGM of 14 August 2009 containing information concerning the discrepancy in the accounts of the company.

[8] Upon the 3rd, 4th and 5th defendants insisting that the plaintiffs implement that part of the consent order requiring them to execute the sale and purchase agreement for the purchase by them of the shares of Folin Food, at the fair price determined by the 2nd defendant, the plaintiffs refused to do so. The plaintiffs, instead, filed this claim contending that the 2nd defendant's valuation of the shares of Folin Food at RM2.9 million did not constitute a fair price (See para. 22 of the statement of claim). The claim *inter alia*, prays for a declaration to

this effect and seeks an injunction restraining the parties to the sale and purchase agreement from executing and/or completing the sale and purchase agreement on the basis of the 2nd defendant's valuation report. Additionally, the plaintiffs allege negligence on the part of the 2nd defendant *inter alia* in the preparation of the valuation report and seek damages against them. The 3rd, 4th and 5th defendants in turn, filed a counter-claim seeking the specific performance of the consent order for the plaintiff's to execute and return the sale and purchase agreement to their solicitors.

[9] Issue

(a) The short question arising in this suit is whether the valuation report filed with the court by DW2 on behalf of the 2nd defendant, is binding on all parties to the consent order, notwithstanding, the allegations of error and under valuation made by the liquidators, and

(b) Whether the 2nd defendant was negligent in the discharge of its duties as the court appointed valuer to determine the fair price of the shares of Folin Food.

[10] Salient Features Of The Consent Order

(a) The 2nd defendant were appointed expert valuers by both parties ie, the plaintiff and the defendant;

(b) The valuers were to enjoy unfettered and unrestricted access to the books of Folin Food;

(c) The 2nd defendant was required to complete the exercise by 4 September 2009 ie, 90 days;

(d) The fair price determined by the 2nd defendant was for purposes of the sale and purchase agreement to be executed under the terms of the consent order, and

(e) The consent order was by way of full and final settlement of the dispute between the plaintiffs and the defendants of all matters concerning Folin Food.

[11] The finality of the agreement reached by the parties to the consent order as regards the binding nature of the valuation report, save for manifest errors is evident by the inclusion of the words "with no liberty to file afresh". The parties' intention for the consent order to be by way of full and final settlement of their differences over the affairs of Folin Food is reinforced by the contents of the defendant's solicitor's letter of 7 April 2009 (exh. 105 of F). The court being permitted to look at this

document as forming part of the background facts leading to the consent order. (See *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v. Arab Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 CLJ 779).

Plaintiff's Case

[12] The principal allegation against the 2nd defendant is that they failed miserably in the performance of their duties as an expert valuer. First, that, contrary to the terms of the consent order, they failed to take instructions from Folin Brothers by relying on information furnished by the 3rd defendant only. The liquidators now allege that the 3rd defendant acted without the authority of Folin Food when instructing DW2, to the exclusion of the liquidators. Secondly, the liquidators alleged that the appointment of First Pacific by DW2 was similarly unauthorized as no resolution was passed by Folin Food to sanction his appointment. Thirdly, DW2's reliance on the draft audited accounts FY 2008 is challenged arising from the exclusion of certain disputed items in this report. Finally, that the valuation report produced by First Pacific grossly undervalued the principal asset of Folin Brothers, having regard to previous offers for this property originating from the defendants themselves. The plaintiff called an expert witness and cross-examined DW1 at length highlighting flaws in his report.

Defendant's Case

[13] In the absence of an allegation of fraud and there is none, in this case, the valuation of the expert valuer is binding and cannot be challenged in a court of law, save for manifest errors. Secondly, that the only reason why DW2 took instructions from the third defendant ('DW3') was because that was what he was required to do by the 2nd defendant, acting on behalf of the liquidators. Thirdly, the appointment of First Pacific by Folin Food was because this was a term in the 2nd defendant's letter of appointment. The 2nd defendant accepted DW3's nomination of First Pacific on the assumption that he was duly authorized by Folin Food to do so. This assumption arising from the representation of PW1 that DW3 was a Director of Folin Food in charge of the day to day management of Folin Food. Finally, that the 2nd defendant relied on the draft audited accounts FY 31 December 2008 because that was the latest audited accounts of Folin Food available for inspection by him.

Law Governing Expert Determination

[14] It is settled law that a challenge of an expert valuation is limited to proof of fraud or collusion or manifest error. Lord Denning in the English case of *Campbell v. Edwards* had this to say on the subject:

> ... It is simply the law of contract. If two persons agreed that the price of the property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, their bound by it. Even if he made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything ...

[15] The principle explained in *Campbell v. Edwards* was subsequently expanded upon, in the case of *Jones v. Sherwood Computer Services plc*, also a decision of the English Court of Appeal. This is what was said by Dillon LJ in that case:

> ... On principle the first step must to be see what the parties have agreed to remit to the expert, that be, as Lord Denning M.R said in *Campbell v. Edwards*, a matter of contract. The next step must to be see what the nature of mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect - eg, if he valued the wrong number of shares, or valued shares in the wrong company, or if, as in *Jones (m) v. Jones (R R)*, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that- either party would be able to say that the certificate was not binding because the expert had not done what was appointed to do ...

[16] It is common ground that the above pronouncements of the two Law Lords also represents the law of Malaysia, on this subject.

Decision

[17] Counsel for the plaintiff has conceded that the plaintiffs are not relying on fraud or collusion. Following the pronouncements of Dillon LJ, this leaves the plaintiffs with the burden of proving that DW2 had committed a manifest error of the nature contemplated in the pronouncements of Dillon LJ to justify this court upholding the plaintiff's case. With this in mind, I propose to examine the four grounds raised by the plaintiff as constituting the manifest errors committed by the 2nd defendant. The first ground is the failure of the 2nd defendant to consult the liquidators when determining which accounts of Folin Brothers were to be taken into consideration and in the appointment of the property valuer. With respect, I find no merit in this complaint for three reasons. First, by the terms of the first paragraph of the consent order, the 2nd defendant was granted "unrestricted and unfettered access to the books of the 1st defendant". A clause of this nature and the very nature of the role of an expert, as opposed to an arbitrator, entitles the expert to adopt an inquisitorial, investigative approach without the need to refer to parties before making the decision. (See *Evergrate Construction Company Ltd v. Presscrete Engineering Ptd Ltd* [2006] 1 SLR 634). Secondly, even

A if there was a need for DW2 to obtain instructions from Folin Food, in my judgment, this obligation was discharged by DW2 taking instructions from DW3. It is my finding that DW2 was justified in dealing with DW3 to the exclusion of the liquidators because he is a Director of Folin Food and it was PW1, on behalf of the liquidators, who had
B required DW2 to deal with him. PW1 confirmed this to be the case in cross-examination:

Q 108: Mr Ng, my instruction is that Mr Vickneswaran from EY did call you immediately after 4 June 2009 when the consent order was made

C

A 108: I believe so. But he only asked where whether I have the documents and I directed him to Wong Sin Fan to contact.

[18] This is consistent with DW2's evidence-in-chief. It is also
D consistent with PW1's evidence that he did inform DW2 that the 3rd defendant was in charge of the day to day management of Folin Food and the documents of Folin Food in his control. Furthermore, PW1 confirmed in cross-examination that Folin Food is essentially a dormant company whose only income is from the collection of rental, and that there is really not much information relating to the company:

E

Q 106: You will agree that, Mr. Ng, there is really not much information relating to the business because as you said it's a dormant company.

F A 106: Correct

[19] Thirdly, at the time of the conclusion of the consent order, the liquidators and the 3rd defendant were on the opposing sides of litigation involving Folin Food. Yet, when contacted by DW2, following the consent order, PW1 voluntarily required DW2 to deal with the 3rd
G defendant, another Director of Folin Food. It is my finding that DW2 cannot be faulted for assuming based on the representation of PW1, that he was to communicate with DW3, henceforth, on all matters concerning Folin Food. I am fortified in making this finding by PW1's failure to communicate with DW2 subsequent to his representation
H concerning DW3's management of the affairs of Folin Food. I opine to this effect because PW1 as a party to the consent order was fully aware that DW2 had to complete the valuation exercise within 90 days. Yet, after directing DW2 to the 3rd defendant, PW1 by his own admission never contacted DW2 thereafter. The irresistible inference from this
I conduct of PW1 is that he was perfectly happy to leave the implementation of the consent order in the hands of the 3rd defendant

in his capacity as the active Director of Folin Food. Accordingly, I hold that DW2 did not depart from the terms of the consent order by acting on the instructions of DW3 so as to justify a finding of manifest error, on his part.

[20] The second ground is that DW2 erroneously relied on the 2008 draft audited accounts without regard to the disputed items. With respect, I reject this ground for the following reasons. First, according to PW1's own admission Folin Food is essentially a dormant company whose only income is from the collection of rental. For this reason, the accounts of the company are not material. This fact was also acknowledged in the background facts in the letter of appointment. Secondly, since the liquidators were on the opposing sides of the litigation leading to the recording of the consent order, surely, the liquidators ought to have highlighted the discrepancy in the accounts when contacted by DW2 if the discrepancies were material. PW1's failure to bring these discrepancies, if any, to the attention of DW2 when contacted by him, gives rises to the irresistible inference that he did not consider the disputed excluded items to be material. Thirdly, although PW 1 called an EGM of Folin Food to discuss the disputed items in the 2008 accounts, he adjourned this meeting in his capacity as the chairman of the meeting, without resolving this same disputed excluded items. In other words, the disputed excluded items cannot conceivably be material as PW1 has not properly raised and resolved the items at the meeting of the members until today. How can PW1 expect DW2 to take the disputed excluded items into consideration when he was required to produce his report within 90 days, when he himself has not been able to resolve this issue until today? It is my finding that PW1 has raised this issue as an afterthought to support his claim in this action. My finding to this effect is fortified by the following exchanges during cross examination.

Q 184: So if that's the case, then there is very little difference. EY valued it at RM 2.9 million, if its RM500,000 more, it'll be RM 3.4 million, correct?

A 184: Correct. Provided the value at RM5.9 million is correct.

Q 185: Yes. Provided the value at RM5.9 million, that we don't know, you cannot say. We cannot say. So you agree that really this dispute about the account is a very minor part of the valuation.

A 185: In a manner of speaking yes.

A Q 186: Thank you. So the real dispute is about the value of the property, not about this accounts.

A 186: Correct

Q 187: Because even if EY had valued at RM3.4 million, you will
B not be happy.

Q 187: I believe so.

[21] The third ground is that the appointment of First Pacific was without the knowledge or approval of the liquidators and not supported
C by a resolution of Folin Food. With respect, there is no merit in this complaint. First, the 3rd defendant is the director of Folin Food and consequently entitled to nominate First Pacific, in the absence of any suggestion of any collusion between the 3rd defendant and first pacific and there is none. Secondly, it was a term in the 2nd defendant's letter
D of appointment that Folin Food would undertake the appointment of the property valuer. The liquidators having required DW2 to deal with the 3rd defendant and having allowed the third defendant to sign the 2nd defendant's letter of appointment can hardly be heard to complain after the expiration of 90 days, that the appointment of First Pacific was
E unlawful by reason of the absence of the resolution of Folin Food. The ingenuity of PW1 in raising this as a manifest error is evident from the fact that he neither sought the approval of the 3rd defendant nor caused a resolution to be passed, when he appointed Khong and Jaafar to undertake a valuation of the same property, on behalf of Folin Food.

F **[22]** In my judgment, the fact that the appointment of First Pacific by DW2 was in accordance with the terms of reference and letter of appointment executed by Folin Food pursuant to the terms of the consent order effectively defeats the plaintiff's complaint that the 2nd defendant had departed from the terms of the consent order by
G appointing First Pacific. Once it is accepted, that the 2nd defendant had not departed from the terms of the consent order in the appointment of First Pacific, it must follow that there is no manifest error.

[23] Finally, there is the plaintiff's allegation of undervaluation on the
H part of First Pacific. With respect I am unable to follow the submission of counsel for the plaintiff as to how any undervaluation of the property by a valuer lawfully appointed following the terms of the consent order can constitute a manifest error so as to justify a challenge of the valuation of DW2. In my judgment, once it is acknowledged that DW2's appointment of First Pacific was lawfully made under the terms of the
I consent order, the valuation of DW2 cannot be challenged save on an

allegation of fraud or collusion in the appointment of First Pacific. The plaintiffs make no such allegation. My opinion to this effect has the support of Justice Lexis Gillard.

[24] In Commonwealth of *Australia v. Wawbe Pty Ltd* BC 9805379, Lexis Gillard J, correctly, in my view, observed:

> In each case the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor it is relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. **The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract**. (Emphasis added).

[25] My reasons for rejecting the plaintiff's prayers for the appointment of a new valuer and for him to undertake a revaluation to determine the fair price are, perhaps, best described in the language of Justice VK Rajah when he dismissed prayers of a like nature against background facts not materially different from those of this case. His Lordship VK Rajah delivering the judgment of the High Court of Singapore in the case of *Evergrate Construction Co Pte Ltd v. Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 had this to say:

> In the absence of fraud or any corrupt colouring of the IA's determination, there is neither liberty nor latitude to interfere with or rewrite the parties' solemn and considered contractual bargain, see [5]. It is quite inappropriate for the court to substitute its own view on the merits when the parties have already agreed to rely on the expertise of an expert for a final and irrevocable determination. I must in the context of the current circumstances add that, even if there were discretionary right to reopen the award, I would not exercise that option-given the wholly inappropriate and cavalier conduct manifested by the Plaintiff throughout the assessment process.

[26] In my opinion, the reasoning in the above passage absolves me of the need to consider the merits of the reports and evidence of the expert (PW2). For the same reasons, I reject the submission of counsel for the plaintiffs that ordering the appointment of a new valuer to undertake a fresh valuation does not amount to the court interfering with the intention of the parties. Accordingly, I see no need to consider the merits of the evidence of the expert witness (PW2) called by the plaintiff to dispute the valuation of first pacific.

[27] On the basis of my earlier finding that the 2nd defendant did not depart from the terms of the consent order in taking instructions from the 3rd defendant, including in the appointment of First Pacific as the valuer of the property, I dismiss the claim for negligence against the 2nd defendant.

Conclusion

[28] In the ultimate analysis, the consent order was designed to resolve the outstanding issues affecting Folin Food and by extension Folin Brothers, being the owners of all the shares of Folin Food. Folin Brothers is a family company owned by the 3rd, 4th and 5th defendants and the Estate of one brother who has passed away and the official assignee, in the case of another brother, who is a bankrupt. The question that bothered me throughout the trial was why are the liquidators fighting to revalue the property, contrary to the terms of the consent order, when the 3rd, 4th and 5th defendants oppose a revaluation of the property. Furthermore, there is no evidence to suggest that the estate of the deceased brother supports the liquidator's application and the official assignee's absence suggests that they do not support this application, either. When I asked PW1 this very question, he mentioned something about the creditors of the brother who is a bankrupt being adversely affected, if Liquidators did not obtain the best price for the property. However, when questioned further, PW1 was unable to identify who these creditors were and had even less knowledge of the precise indebtedness of the estate of the bankrupt.

[29] In the light of these answers of PW1 and the raising by him of insignificant matters such as the alleged disregard by the valuer of the disputed items in the audited accounts, I can only conclude that the liquidators are challenging the consent order more out of self interest than in the discharge of their duties as Liquidators of Folin Brothers and Directors of Folin Food. I am fortified in coming to this conclusion by the fact that the liquidators relied on the very same consent order that they are seeking to depart from in this action, to defend their entitlement to remain as Liquidators when some of the defendants in this action sought to remove them as Liquidators in Companies Winding up No. 28-66-1980.

[30] Accordingly, I dismiss the plaintiff's claim with costs. I order in terms of prayers (1), (2), (3) and (4) of the 3rd, 4th and 5th defendants' counter-claim save that in respect of prayer (2), the plaintiff is allowed seven days *in lieu* of the two days stated in the prayer to comply with the same.

[31] On the question of costs, it was urged upon me to order that the costs of encl. 1 and the counter-claim be borne by the liquidators personally. In my judgment, the costs ought to be borne by the liquidators personally only upon the court being satisfied that liquidators had acted unreasonably in commencing and pursuing these proceedings. Generally, it is accepted that different standards should apply depending on whether the liquidator is defending a claim or pursuing a claim. In cases where the liquidator is defending a claim, the courts will not order costs against the liquidator personally, save in exceptional circumstances (see *Mead v. Watson as Liquidator for Hypec Electronics* [2005] NCWCA 133). The rationale for this principle is that, it is frequently the case that the liquidator given the obligation to protect and administer the fund in the interest of all creditors and contributories, has no practical choice other than to contest proceedings instituted against him or the company in liquidation. However, in the case where the liquidator pursues the claim, the court can order costs against the liquidator based on the lower standard of reasonableness. I am satisfied that the conduct of the liquidators in filing and pursuing this claim is without any justification as is evident from the findings in my judgment. Accordingly, I hold that the liquidators have not acted reasonably in filing and pursuing this suit, and order that the costs of this suit be borne by the liquidators personally. Pursuant thereto, I order the 2nd and 3rd plaintiffs to pay lump sum costs of RM25,000 to the 2nd defendant and the further sum of RM25,000 to the 3rd, 4th & 5th defendants *in lieu* of taxation.